

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK  
UTICA DIVISION

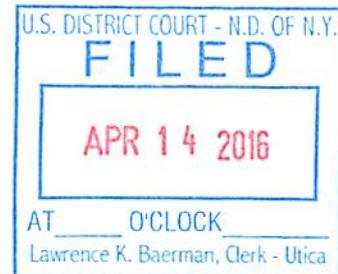
WAYNE H. NORMAN,  
Plaintiff,

vs.

UTICA COLLEGE,  
Defendant.

Civil Action File No.

6:16-cv-0423(DNH)ATB



**ORIGINAL COMPLAINT**

NOW COMES the Plaintiff, WAYNE H. NORMAN, by and through himself and for his Complaint against the Defendant, UTICA COLLEGE, states as follows:

**NATURE OF THIS ACTION**

1. Plaintiff brings this action for actual and statutory damages arising out of and relating to the conduct of UTICA COLLEGE, (hereinafter, UC), to include all of its affiliates, subsidiaries, and/or related entities, as well as all

persons and entities acting on behalf of UC, including but not limited to UC, in negligently, knowingly, and/or willfully contacting Plaintiff on his cellular telephone without his prior express consent within the meaning of the TCPA.

2. This is an action for actual and statutory damages for violations of the Telephone Consumer Protection Act (hereinafter, "TCPA"), 47 U.S.C. section 227 *et seq.*

3. UC, has violated the TCPA by contacting the Plaintiff on his cellular telephone via an "automatic dialing system," as defined by 47 U.S.C § 227 (a)(1), without prior express consent within the meaning of the TCPA.

#### **JURISDICTION & VENUE**

4. Jurisdiction arises under the TCPA, pursuant to 28 U.S.C. section 1331.

#### **PARTIES**

5. WAYNE H. NORMAN, (hereinafter, "Plaintiff"), is a natural person who was at all relevant times residing in the county of Shelby, state of Tennessee.

6. UTICA COLLEGE, (hereinafter, "Defendant"), is a company with an address of 1600 Burrstone Road, Utica, NY 13502, and is a "person" as

defined by 47 U.S.C. section 153(39).

**THE TELEPHONE CONSUMER PROTECTION ACT OF 1991**  
**(TCPA) 47 U.S.C §227**

7. In 1991, Congress enacted the TCPA in response to a growing number of consumer complaints regarding certain telemarketing practices.

8. The TCPA regulates, *inter alia*, the use of automated telephone equipment, or “predictive-dialers”, defined as equipment which “has the capacity... (a) to store or produce telephone numbers to be called, using a random or sequential number generator; and (b) to dial such numbers. 47 U.S.C. § 227(a)(1). Specifically, the plain language of section 227(b)(1)(A) (iii) prohibits the use of auto-dialers to make any call to a wireless number in the absence of an emergency or the prior express consent of the called party.

9. According to findings by the Federal Communications Commission (FCC), the agency Congress vested with authority to issue regulations implementing the TCPA, such calls are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also

recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used.

10. The TCPA prohibits the use of automatic telephone dialing systems and the prerecorded messages to call wireless devices. § 227(b) prohibits... the use of automated telephone equipment; (1) Prohibitions..."It shall be unlawful for any person within the United States or any person outside the United States if the recipient is within the United States—..."

#### **A BRIEF OVERVIEW OF TEXT MESSAGING**

11. In recent years, marketers who often have felt stymied by federal laws limiting solicitation by telephone, facsimile machine, and email have increasingly looked to alternative technologies through which to send bulk solicitations cheaply.

12. One of the newest types of such bulk marketing is to advertise through Short Message Services. The term "Short Message Service" or "SMS" describes a messaging system that allows cellular telephone subscribers to use their cellular telephones to send and receive short text messages, usually limited to 120-150 characters.

13. An "SMS message" is a text message call directed to a wireless device

through the use of the telephone number assigned to the device. When an SMS message

call is successfully made, the recipient's cell phone rings, alerting him or her that a call is being received.

14. Unlike more conventional advertisements, SMS calls, and particularly wireless or mobile spam, can actually cost their recipients money, because cell phone users must frequently pay their respective wireless service providers either for each text message call they receive or incur a usage allocation deduction to their text plan, regardless of whether or not the message is authorized.

15. Most commercial SMS messages are sent from "short codes" (also known as "short numbers"), which are special cellular telephone exchanges, typically only five or six digit extensions, that can be used to address SMS messages to mobile phones. Short codes are generally easier to remember and are utilized by consumers to subscribe to such services such as television program voting or more benevolent uses, such as making charitable donations.

16. A short code is sent to consumers along with the actual text message and conclusively reveals the originator of the SMS message.

17. Text messages are “calls” within the purview of the TCPA.

*See Satterfield v Simon & Schuster, Inc., 569 F.3d (9<sup>th</sup> Cir. 2009).*

### **ALLEGATIONS OF FACT**

18. Within the last four years, and beginning on or around May 29<sup>th</sup>, 2015,

Utica College placed multiple calls to Plaintiff’s cellular telephone (682)

241-8688 from (315) 732-2640, by using an automated telephone dialer

system (“ATDS” or “predictive dialer”) and/or by using an artificial or

prerecorded voice.

19. When Plaintiff answered calls from the Defendant he would hear ringing

and an automated prerecorded message say, “Please hold” before being

connected to a live person.

20. On other occasions, Plaintiff received text messages from “703-89” (the

Defendant) without his expressed written consent stating: “Timothy, Utica

College has rcvd your request about our online FCI Certificate. When would

be a good time to contact you?”

21. Plaintiff has never provided his cellular phone number to Defendant or

given his prior express consent to be called, whether on his own or on

behalf of any third

party.

22. Defendant's calls utilized interactive voice recognition technology, also known as a predictive dialer, in which a machine places calls, and when a consumer answers the phone there is a noticeable pause prior to being connected to a live representative of Defendant.

23. This technology, upon information and belief, dials several numbers simultaneously and connects the call only to those who answer first.

24. Defendants telephone calls to Plaintiffs cellular telephone utilizing an "artificial or prerecorded voice" or placed by "an automatic telephone dialing system" for non-emergency purposes and in the absence of the Plaintiff's prior express consent violated 47 U.S.C. § 227(b)(1)(A).

25. Under the TCPA and pursuant to the FCC's January 2008 Declaratory Ruling, the burden is on Defendant to demonstrate that Plaintiff provided express consent within the meaning of the statute.

26. Under the TCPA and pursuant to the FCC's July 2015 Declaratory Ruling, the burden is on Defendant to demonstrate that Plaintiff provided express consent within the meaning of the statute.

27. Plaintiff suffered harm and damages in the form of text message, data, and other charges to his cellular telephone plan.

**QUESTIONS OF LAW**

28. Questions of law and fact include, but are not limited to, the following:

- a. Whether Defendant made non-emergency calls to Plaintiff's cellular telephone using an automatic telephone dialing system or artificial or prerecorded voice;
- b. Whether Defendants conduct was knowing and/or willful;
- c. Whether Defendant is liable for damages and the amount of such damages.

**COUNT I**

**VIOLATION OF THE ("TCPA"), 47 U.S.C. SECTION 227, ET SEQ.**

29. The Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

30. Without prior express consent, the Defendant contacted the Plaintiff at least 10 (10) times by means of automatic telephone calls or, prerecorded messages at a cellular telephone or pager in violation of 47 U.S.C. section 227(b)(A)(iii).

31. The phone calls were made to Plaintiff without the number being provided to Defendant, and without the prior express consent of Plaintiff.

32. Defendant's equipment qualifies as a predictive dialer because it is

equipment, combining software and hardware aspects, that has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers.

**PRAYER FOR RELIEF**

a) As a result of the Defendant's knowing and/or willful violations of 47 U.S.C.

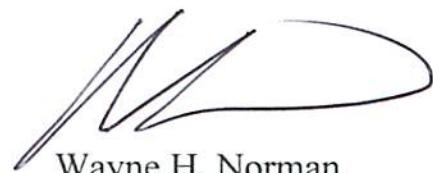
§ 227 et seq., Plaintiff is entitled to treble damages of up to \$1,500.00 for each and every call in violation of the statue, pursuant to 47 U.S.C. § 227

(b)(3);

b) An award of all fees and costs incurred by Plaintiff;

c) All other cost the Court sees justifiable under the law.

Respectfully submitted,



Wayne H. Norman

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